

# CRS Report for Congress

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## Hate Crimes: Legal Issues

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### Summary

Under existing law, certain offenses against victims based on their race, color, religion, or national origin are covered by civil rights legislation. Most crimes against victims based on their gender, disability, or sexual orientation are covered under state law, unless such crimes are committed within federal jurisdictions. The objective for broadening federal intervention is for the purpose of enhancing the penalties for the crimes and consequently serving as a greater deterrent.

In the 108<sup>th</sup> Congress, H.R. 80 has been introduced, which would remove obstacles to federal prosecution and provide authority for federal involvement in crimes directed at individuals or groups because of their race, color, religion, national origin, disability or sexual orientation. The bill is based on the Local Enforcement Enhancement Act of 2000, endorsed by both the House and Senate in the 106<sup>th</sup> Congress, but which was never enacted into law. The bill and a second proposal, H.R. 394, address the jurisdictional implications of the Supreme Court's *Morrison* decision, which found jurisdictionally inadequate Congress's efforts to create a cause of action for victims of crimes motivated by gender-based animus. H.R. 80 does so with an expanded hate crime statute; H.R. 394 with a more jurisdictionally precise cause of action for gender-motivated animus. The Local Law Enforcement Enactment Act of 2003 (S. 966) and the Local Law Enforcement Hate Crimes Prevention Act of 2004 (H.R. 4204) are companion bills that, among other things, would expand the ability of the federal government to assist states and Indian tribes in their investigation and prosecution of hate crime cases, and would expand the definition of a hate crime to include sexual orientation, gender, or disability.

On June 15, 2004, the Senate passed S. 966 by a vote of 65-33 as an amendment to S. 2400 (Defense appropriations bill). On September 25, 2004, the House voted in favor of keeping the hate crimes measure in the defense bill by a bipartisan vote of 213-186. However, the measure was stripped out in conference committee on October 7, 2004.

## Background

Instances of hate crime appear throughout United States history, including recent history. Recent instances include widespread racist lynchings during the early twentieth century, the murders of Emmet Till<sup>1</sup> in 1955, Medgar Evers<sup>2</sup> in 1963, and Dr. Martin Luther King<sup>3</sup> in 1968, church bombings and attacks on peaceful black protesters during the civil rights movement of the 1960s,<sup>4</sup> and the burning of more than 60 black churches during the 1990s.

In the 1980s and early 1990s, there was an upsurge in public attention focused on hate crime. Federal and state governments appointed commissions to study the issue and, subsequently, they debated and passed hate crime laws in almost every jurisdiction.<sup>5</sup> Prior to 1980, numerous states had laws targeting hate crime, many of which were enacted during the Reconstruction era to limit Ku Klux Klan activity.<sup>6</sup> The issue has also reached the Supreme Court, which decided two hate crime cases in quick succession in 1992 and 1993, a third decision in June, 2000, and a fourth in 2003.<sup>7</sup>

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<sup>1</sup> Emmet Till, a 14-year-old African American boy from Chicago was kidnaped and shot in Mississippi in 1955 after he allegedly said “Bye, baby” to a white woman in a grocery. The two white men accused of the murder were acquitted by an all-white, all-male jury. See Juan Williams, *Eyes on the Prize: America’s Civil Rights Years, 1954-1965* (New York: Viking, 1987), 39-57.

<sup>2</sup> Medgar Evers, Mississippi leader of the National Association for the Advancement of Colored People (NAACP), was murdered in his driveway in 1963.

<sup>3</sup> See CRS Report 95-616, *Hate Violence in the United States: Background and Current Dimensions*, by William Ellis (archived). A surge of burnings of predominantly black churches in 1995 and 1996 again spotlighted national attention on racism and hate violence. See, e.g., Fox Butterfield, “Old Fears and New Hopes: Tale of Burned Black Church Goes Far Beyond Arson,” *New York Times*, July 21, 1996, at A 12 (reporting racial tension in South, where approximately 67 black churches had been burned since 1995). Also in Laramie, Wyoming, one of the two men charged with the October 1998 of Matthew Shepherd, a homosexual, was sentenced to life in prison.

<sup>4</sup> See Williams, *supra*, at 179-95.

<sup>5</sup> See CRS Report 95-616, *supra*, at 18.

<sup>6</sup> *Id.* at 14.

<sup>7</sup> See *Apprendi v. New Jersey*, 502 U.S. 466 (2000) (invalidating Apprendi’s increased sentence for committing a hate crime, determining that the New Jersey statute authorizing the enhanced sentence created an element of the crime and therefore the jury and not the judge had to reach that conclusion); *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993) (upholding state hate crime law allowing sentence enhancement upon proof of bias motivation); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (invalidating the city ordinance applied against cross burning as unconstitutional viewpoint discrimination). In *Virginia v. Black*, 538 U.S. 343 (2003), the Court was presented with the issue of whether the Virginia statute that bans cross burning with intent to intimidate violates the First Amendment, even though the statute reaches all such intimidation and is not limited to any racial, religious, or other content-focused category. In upholding most of the statute barring cross burning on public and private property when it is carried out with the intent to intimidate, the Court said under some circumstances, cross burning could be a form of

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## Current Law

There are several federal statutes providing jurisdiction to prosecute hate crimes.<sup>8</sup> Federal civil rights statutes provide for prosecution of conspiracies to interfere with federally protected rights,<sup>9</sup> of the use of force or threat of force to injure or intimidate someone in the enjoyment of specific rights such as voting, for employment, education, use of public facilities,<sup>10</sup> and of criminal housing interference.<sup>11</sup> In addition, the Church Arson Protection Act of 1996 amended criminal civil rights statutes to facilitate prosecutions of racially motivated arson and other acts of desecration against houses of worship.<sup>12</sup>

Prior to 1980, the rate of expansion of state hate crime legislation had not been reflected at the federal level. As indicated above, the primary tools for battling hate crimes at the federal level remain criminal civil rights statutes, many of which were passed in the Reconstruction era as a response to widespread violence against newly freed African Americans. These laws are limited in scope, covering only violence motivated by biases against groups whose civil rights are otherwise protected under federal law.<sup>13</sup>

In recent years, however, significant developments have occurred at the federal level. Among these developments is the Hate Crimes Statistics Act of 1990 (HCSA), which authorized the Attorney General to collect data from local police departments on enumerated crimes that “... manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity....”<sup>14</sup> Unlike most comprehensive hate crime laws passed by the states, the federal Hate Crimes Statistics Act is strictly limited to data collection and contains very few enforcement mechanisms.

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<sup>7</sup> (...continued)

expression protected by the First Amendment. Hence, the Court struck down part of the statute that said jurors could presume that anyone who burns a cross intended to intimidate. After reviewing the long history of cross burning as a malicious “symbol of hate” the Court distinguished the precedent in *R.A.V. v. City of St. Paul*, which struck down a similar cross burning statute as impermissible discrimination based on the content of the speech. In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held that neither the Commerce Clause nor the Fourteenth Amendment were sufficient to support the Violence Against Women Act’s effort to create a cause of action for victims of crimes motivated by gender-based animus.

<sup>8</sup> Under current law, federal prosecutors are powerless to intervene in hate-motivated crimes based on racial or religious bias unless they can establish the victim’s involvement in a federally protected activity. In addition, federal law provides no authority for involvement in hate crimes based on sexual orientation, gender, or disability-based bias, even when local and state law enforcement is unavailable because either the law is insufficient, resources are inadequate or local biases prevent action.

<sup>9</sup> 18 U.S.C. § 241(2000).

<sup>10</sup> 18 U.S.C. § 245 (2000).

<sup>11</sup> 42 U.S.C. § 3631 (2000).

<sup>12</sup> 18 U.S.C. § 247 (2000).

<sup>13</sup> See *supra* notes 9-12.

<sup>14</sup> P.L. 101-275, § 2(b)(1), 104 Stat. 140 (codified at 28 U.S.C. § 534 note (2000)).

Additionally, in the aftermath of the series of fires at black churches, Congress passed and President Clinton signed into law the Church Arson Prevention Act of 1996.<sup>15</sup> The act prohibits intentionally defacing, damaging, or destroying religious real property (or attempting to do so) because of the race, color, or ethnic characteristics of any individual associated with such property.<sup>16</sup> The federal criminal code prohibitions apply when the offense is in, or affects, interstate commerce. The statute includes within the definition of “religious real property” fixtures or religious objects contained within a place of religious worship.<sup>17</sup>

Another development in federal law is a sentence enhancement for federal bias crimes,<sup>18</sup> implemented by the United States Sentencing Commission under the direction of the Violent Crime Control and Law Enforcement Act of 1994.<sup>19</sup>

## Legislation

**H.R. 80:** Representative Jackson-Lee introduced the Hate Crimes Prevention Act as H.R. 80 on January 7, 2003. It is based on a proposal which passed the Senate in the 106<sup>th</sup> Congress as an amendment to the Defense Authorization Act for Fiscal Year 2001 (Kennedy amendment 3473), 146 Cong. Rec. S5434 (daily ed. June 20, 2000).<sup>20</sup> In the 107<sup>th</sup> Congress, the Senate Judiciary Committee reported out a similar bill (S. 625 — Local Law Enforcement Act of 2001 — commonly known as the “Hate Crimes Prevention Act”) favorably, S.Rept. 107-147, but no further action was taken.

H.R. 80 would create two new federal crimes (18 U.S.C. § 245(c)(1), (c)(2)). The first outlaws crimes of violence motivated by animus based on race, color, religion, or national origin without any further jurisdictional nexus. The second proscribes crimes of violence motivated by animus based on religion, national origin, gender, sexual orientation, or disability under an array of jurisdictional circumstances (e.g., interstate travel, use of a facility in interstate commerce, or circumstances under which the offense interferes with or affects interstate commerce). Violations are punishable by imprisonment for life or any term of years if death results from the offense or if the offense involves kidnaping, rape, or attempted murder, kidnaping or rape (and imprisonment for not more than 10 years in all other cases).

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<sup>15</sup> 18 U.S.C. § 247 (2000).

<sup>16</sup> 18 U.S.C. § 247(c) (2000).

<sup>17</sup> 18 U.S.C. § 247(f) (2000).

<sup>18</sup> See U.S.S.G. § 3A1.1(a) which authorizes a three-level sentencing increase “[i]f the finder of fact at trial ... determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person ....”

<sup>19</sup> 42 U.S.C. § 13701 note (2000).

<sup>20</sup> Although the House passed a resolution instructing its conferees to support the Kennedy Amendment, 146 Cong. Rec. H7541 (daily ed. Sept. 13, 2000), the amendment was dropped in conference, H.Rept. 106-945 (2000).

In addition, H.R. 80 directs the United States Sentencing Commission to study the issue of adult recruitment of juveniles to commit hate crimes and, if appropriate, amend the federal sentencing guidelines to provide sentencing enhancements for adult defendants who recruit juveniles to assist in the commission of hate crimes; 2) empowers the Attorney General to make grants to state and local hate crime programs and to provide other forms of law enforcement assistance to help state, local and tribal authorities in order to prosecute hate crimes; and 3) authorizes appropriations to the Department of the Treasury and to the Department of Justice to increase the number of personnel to prevent and respond to allegations of violations of the act.

**S. 966/H.R. 4204:** On May 1, 2003, S. 966, the Local Law Enforcement Act of 2003 was introduced by Senator Kennedy; Representative Conyers introduced its House counterpart (H.R. 4204) on April 22, 2004. They would among other things: 1) broaden the federal definition of hate crimes and provide federal assistance to investigate and prosecute them; and 2) include offenses involving animus toward the victim's actual or perceived gender, sexual orientation, or disability. The current definition includes offenses based on animus toward the victim's actual or perceived race, color, religion, or national origin.

Section 4 would authorize local law enforcement officials of a state or an Indian tribe to request assistance from the Justice Department in the criminal prosecution of any crime that constitutes a crime of violence that was motivated by prejudice based upon race, color, religion, national origin, gender, or sexual orientation. Priority would be given to offenders who committed crimes in more than one State and to rural jurisdictions that might have difficulty covering the extraordinary expenses relating to the investigation or prosecution of the crime. It would allot \$5,000,000.00 for grants up to \$100,000.00 annually to assist local, state, and tribal governments in the investigation and prosecution of hate crimes. Section 5 would authorize such sums which would be necessary for Office of Justice Program grants to combat juvenile hate crimes, including training for local law enforcement in identifying, investigating, prosecuting, and preventing hate crimes.

Section 6 would authorize such sums as would be necessary for three fiscal years to the department of the Treasury and the Department of Justice to increase the number of personnel to prevent and respond to hate crimes created in section 7. Section 7, much like H.R. 80, establishes two new crimes, 18 U.S.C. § 249(a)(1), (a) (2). One outlaws crimes motivated by animus toward the victim's actual or perceived race, color, religion, or national origin, without any further jurisdictional nexus. The second addresses crimes motivated by gender, sexual orientation, or disability discrimination where the definition of hate crime would be limited to crimes with a connection to interstate commerce. Those crimes would include 1) offenses which took place while the defendant or victim was traveling across state lines or national borders; 2) offenses while the defendant or victim was using a channel, facility, or instrumentality of interstate or foreign commerce; 3) offenses which involved firearms, explosives or incendiary device, or other weapon that has traveled in interstate or foreign commerce; and 4) offenses which interfere with the commercial or other economic activity which the victim is engaged at the time of the conduct. This section provides that the convicted felons could be imprisoned for up to 10 years and/or fined. However, if death should occur from the offense or if the crime included attempted or actual kidnapping, sexual abuse, or attempted murder, the sentence could be for any term, including life. It would also require that any federal hate crime

prosecution be preceded by a certification from the Attorney General, the Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General specifically designated by the Attorney General that the crime was motivated by a victim's actual or perceived place in a protected category. The Attorney General or his/her designee would have to consult with State or local law enforcement officials regarding the prosecution and determine that the State or Indian tribe: 1) did not have, or did not intend to exercise jurisdiction; 2) has requested that the federal government assume jurisdiction; and 3) did not object to federal intervention. In the event that there is a State or tribal verdict or sentence regarding the crime, S. 966 would still permit the federal government to intervene only if the federal interest in eradicating the bias-motivated violence was not addressed or left demonstratively unvindicated.

Section 8 would require the United States Sentencing Commission to study adult recruitment of juveniles for hate crimes and amend the federal guidelines, if appropriate, to provide sentencing enhancements for adult defendants. Section 9 would amend the Hate Crime Statistics Act (28 U.S.C. § 534) to include gender-based hate crimes in federal reports, as would H.R. 374 (Representative Maloney), a bill devoted exclusively to that purpose.

On June 15, 2004, the Senate voted 65-33 for the Local Law Enforcement Act of 2003 (S. 966) as a bipartisan amendment to the Senate version of the National Defense Authorization for FY2005 (S. 2400).<sup>21</sup> On September 28, 2004, the House voted in favor of keeping the hate crimes measure in the Defense appropriations bill by a bipartisan vote of 213-186.<sup>22</sup> Passage in the Senate was a major step for the legislation, but the provision still had to survive the conference process with the Senate and House conferees as well as the House leadership. The House and Senate Armed Services Committees met to negotiate the differences between their two versions of the Defense authorization bills (H.R. 4200, Title XXXIV, Sec. 3401/S. 2400, Title XXXIV, Sec. 3401), including the hate crimes amendment (S. 966/H.R. 4204).<sup>23</sup> On October 7, 2004, the conference report was agreed to without the hate crimes provision.<sup>24</sup>

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<sup>21</sup> 150 Cong. Rec. S6775 (daily ed. June 15, 2004).

<sup>22</sup> 150 Cong. Rec. H7699 (daily ed. Sept. 28, 2004).

<sup>23</sup> The Senate hate crime provision is included in H.R. 4200 (National Defense Authorization Act for FY2005).

<sup>24</sup> 150 Cong. Rec. S10948 (daily ed. Oct. 9, 2004).